

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-3467

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE EX REL. MARY D. GILLIES,

**PETITIONER-APPELLANT-
CROSS-RESPONDENT,**

v.

MILWAUKEE COUNTY PERSONNEL REVIEW BOARD,

**RELATOR-RESPONDENT-
CROSS-APPELLANT.**

APPEAL and CROSS-APPEAL from an order and a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Order reversed; judgment affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Mary D. Gillies appeals from the trial court order quashing her writ of certiorari. Gillies's writ had sought reversal of a decision of the Milwaukee County Personnel Review Board ("PRB") discharging her from the

classified service of Milwaukee County. Gillies argues that this court should reverse the PRB's decision on the grounds that it was contrary to law, arbitrary and oppressive, and unsupported by substantial evidence. Gillies supports her claim with many arguments in her appellate brief discussing a number of different issues. The PRB's brief, in contrast, fails to provide any response to many of the issues which Gillies raises, and responds in a cursory fashion to Gillies's remaining issues and arguments. Consequently, we take a number of Gillies's arguments which the PRB has not attempted to refute to be conceded by the PRB. Accordingly, we reverse the trial court order.

The PRB cross-appeals from the separate trial court judgment granting Gillies her attorney's fees. The PRB claims that the trial court erroneously exercised its discretion by granting the order because it "reached a particular result with no foundation in the law, contrary to its own previous findings and without expressing reasons therefor [sic]." We conclude that the trial court properly exercised its discretion in awarding Gillies her attorney's fees. Therefore, we affirm that judgment.

I. BACKGROUND.

This case arises from Gillies's discharge, on June 28, 1994, from her duties as a registered nurse at Milwaukee County John L. Doyne Hospital. Gillies worked as a nurse in Doyne's Cardiac Medical Intensive Care Unit. On March 5, 1994, Doyne's director of nursing complained that Gillies made changes in a patient's ventilator without a physician's orders and failed to properly chart the patient's vital signs. Gillies was suspended for twenty days as a result of the charges. Hearings were eventually held in April 1995, and Gillies was exonerated

of the March 5, 1994 charges. In June 1994, however, another incident involving Gillies occurred, and as a result, she was terminated.

The June 1994 incident involved a patient, "BP," who was admitted to Doyne on October 28, 1993, as a result of heart problems. On June 18, 1994, at approximately 10:20 p.m., during Gillies's shift, BP's condition worsened to an emergency "code 4" status. Ten days later, on June 28, 1994, BP died.

Following the code 4, Gillies left the hospital and went home without finishing her charting. The next day, Doyne's director of nursing told Gillies not to come to work. Although Gillies asked about coming in to complete her charting, the director of nursing told her to stay home. On June 28, 1994, the day BP died, Gillies was discharged, and the next day written charges were brought against her. The written charges alleged that Gillies "modified or changed the care and treatment given to a patient without orders from a physician and did not document appropriately; there was also a previous incident of a similar nature." Because the charges recommended her discharge, Gillies's case was scheduled to be heard by the PRB.

The PRB held hearings on May 30, June 13, August 22, and September 19, 1995. On September 19, 1995, the PRB rendered a decision sustaining the charges and discharging Gillies from the classified service of Milwaukee County. As part of its decision, the PRB made the following findings of fact:

1. The employe, Mary Gillies, at all times material to the issues herein was employed as a Registered Nurse I at the Milwaukee County John L. Doyne Hospital.
2. On June 18, 1994 while on assignment attending a patient in the Intensive Care Unit at Doyne Hospital the

employe modified or changed the care and treatment given that patient without orders from a physician.

3. The employe failed to document appropriately the patient's medical record (referenced in above Fact No. 2), in that, the employe failed to inscribe a number of entries during the 12 plus continuous hour shift she worked at the hospital that day and before she left work that night a few minutes before midnight.

4. The employe was not availed an opportunity to come to work as assigned on the next day to complete her medical charting when Norma McCutcheon, Director of Nursing, phoned the employe at home and told employe to not come in to work June 19, 1994, stating, "You take a sick day or vacation day, but it is going to be an excused absence."

On October 18, 1995, Gillies filed a Petition for Writ of Certiorari in Milwaukee County Circuit Court. A writ was issued on October 20, 1995, ordering the PRB to certify and return to the Circuit Court within 24 days, by November 13, 1995, all records relating to Gillies's case. Gillies's counsel appeared before the trial court on November 13, 1995, but the PRB did not; and, despite the court's order, the PRB did not produce the record. After over 100 days from the issuance of the court's order, the record had still not been produced. Therefore, on February 9, 1996, Gillies filed a Motion for Writ Absolute to compel the PRB to produce the record. The PRB then produced the record. On July 11, 1996, the court issued an Order for Judgment awarding Gillies \$7,440 in attorney's fees as a sanction for the PRB's violation of the court's order. On September 30, 1996, the court issued an order affirming the PRB's discharge of Gillies and quashing the writ of certiorari. Judgment on the award of Gillies's attorney's fees was entered on October 21, 1996.

Gillies now appeals from the trial court order quashing the writ of certiorari, and the PRB cross-appeals from the trial court judgment awarding Gillies her attorney's fees.

II. ANALYSIS.

1. Appeal—order quashing writ of certiorari.

On appeal from a decision on a writ of certiorari, this court reviews the record and findings of the administrative board, not the order and findings of the trial court. *State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis.2d 646, 651, 275 N.W.2d 668, 671 (1979). “Our review is limited to: (1) whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably issue the order or make the determination in question.” *Clark v. Waupaca Cty. Bd. of Adjustment*, 186 Wis.2d 300, 304, 519 N.W.2d 782, 784 (Ct. App. 1994). Gillies does not claim that the board failed to keep within its jurisdiction. Gillies does, however, appeal on the basis of the remaining three factors.

The requirement that the Board act “according to law” includes an obligation on the Board’s part not only to obey applicable statutes, but also to adhere to “the common-law concepts of due process and fair play.” See *State v. Goulette*, 65 Wis.2d 207, 215, 222 N.W.2d 622, 626-27 (1974); *Marris v. City of Cedarburg*, 176 Wis.2d 14, 24, 498 N.W.2d 842, 846-47 (1993). The Board’s decision is arbitrary, oppressive or unreasonable when it has acted without a rational basis, and the Board’s action represents its will and not its judgment when it fails to exercise discretion. See *Van Ermen v. DHSS*, 84 Wis.2d 57, 64-65, 267 N.W.2d 17, 20-21 (1978). The Board’s decision will pass the fourth part of the test if “reasonable minds could arrive at the same conclusion” as the Board. See *State ex rel. Richards v. Traut*, 145 Wis.2d 677, 680, 429 N.W.2d 81, 82 (Ct.

App. 1988). Finally, “[i]n a review of a decision on a writ of certiorari, there is a presumption that the Board acted according to law and the official decision is correct and the weight and credibility of the evidence cannot be assessed.” *State ex rel. Ruthenberg v. Annuity & Pension Bd.*, 89 Wis.2d 463, 473, 278 N.W.2d 835, 840 (1979).

Gillies’s forty-two-page brief presents us with a number of arguments and issues related to her appellate claims. First, Gillies claims that principles of fair play were violated when the March 5 charges, for which she was exonerated, were used as grounds for her termination. Second, Gillies claims that the PRB could not have consistently found her guilty of the June 18 charges, but not guilty of the March 5 charges given that, in both incidents, the evidence established that she followed the hospital’s standard operating procedures. Third, Gillies claims that the evidence was not sufficient to sustain the Board’s second and third findings that she modified the care and treatment of a patient without a physician’s order, and that she failed to appropriately document the patient’s medical record. Gillies supports these particular claims with five pages of detailed argument in her brief related to the actions which she took, the orders which were given to her, and the accepted practice at the hospital regarding charting and other procedures. Fourth, Gillies claims that the Board violated principles of due process and fair play by admitting prejudicial testimony at the hearings involving “irrelevant and prejudicial hearsay, unsubstantiated ‘opinions,’ and rank speculation.” Fifth, Gillies claims that she was denied a fair hearing because “the entire procedure for the discipline of and the course of dealing with Gillies was devoid of fair play and infected with prejudice.” Gillies specifically contends that “the implicit accusation that Gillies had killed BP permeated the hearings” and unfairly influenced the PRB’s decision. Sixth, Gillies claims that PRB made

insufficient findings to support its decision. Specifically, Gillies argues that the PRB's decision does not state how Gillies changed the patient's care and treatment without an order, thereby preventing meaningful review of the Board's decision.

In response, the PRB has presented this court with an eight-page brief which fails to respond to many of the issues and arguments that Gillies raises. The PRB does respond to Gillies's first claim, that principles of fair play were violated when the March 5 charges against Gillies were allegedly used as grounds for her termination. The PRB also responds briefly, in a cursory two page discussion, to Gillies's claims that there was insufficient evidence to support the Board's second and third findings. The PRB, however, fails to provide any response to Gillies's second, fourth, fifth and sixth claims. The PRB fails to respond to Gillies's claim that the Board could not have consistently found her guilty of the instant charges and not guilty of the March 5 charges. The PRB fails to counter in any way Gillies's claims that standards of due process and fair play were violated: (1) by the Board's admitting prejudicial hearsay, and unsubstantiated opinion and speculative testimony; and (2) by the entire procedure for disciplining Gillies being infected with prejudice related to implicit accusations that she killed the patient. Finally, the PRB does not provide any response to Gillies's claim that the Board's findings are insufficient to support its decision.

This court has previously stated: "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (citation omitted). In the instant case, the PRB has failed to refute a number of Gillies's propositions, which if true, would entitle her to relief. Therefore, we deem the PRB to have admitted

the validity of Gillies's claims, and we conclude that Gillies is entitled to reversal of the trial court order.

2. Cross-appeal—judgment awarding attorney fees.

The PRB cross-appeals from the trial court judgment awarding Gillies her attorney's fees. The PRB claims that the trial court erroneously exercised its discretion because it "reached a particular result with no foundation in the law, contrary to its own previous findings and without expressing reasons thereof." We disagree and conclude that the trial court properly exercised its discretion in awarding Gillies her attorney's fees.

The award of Gillies's attorney's fees resulted from the PRB's failure to file the required record with the trial court in a timely fashion. Pursuant to issuing a writ of certiorari, the trial court ordered the PRB to file a complete record with the court within 24 days. Despite the trial court's order, and Gillies's counsel's request to file the record, the PRB failed to file the record until over 100 days from the issuance of the court's order. Gillies filed a motion asking for her attorney's fees which the court granted, entering an order for judgment awarding her \$7,440 "for reasonable attorneys fees that plaintiff Mary D. Gillies incurred as a result of the defendant's overly burdensome, excessively litigious, undue and unreasonable delays and failure to comply with the statutory and other mandates involved" in the instant case.

As Gillies states in her brief, a trial court has the inherent authority to sanction parties for failure to comply with court orders. *See Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273-74, 470 N.W.2d 859, 863 (1991). The trial court's decision to award attorney fees, pursuant to its inherent authority, as a sanction for the violation of a court order, will only be reviewed for an erroneous

exercise of discretion. *See Schaefer v. Northern Assur. Co. of America*, 182 Wis.2d 148, 163, 513 N.W.2d 615, 621 (Ct. App. 1994). An appellate court generally looks for reasons to sustain the trial court's discretionary decisions, and we may sustain the decision even though the trial court's reasoning may have been erroneous or inadequately expressed. *Schauer v. DeNeveu Homeowners Assoc., Inc.*, 194 Wis.2d 62, 71, 533 N.W.2d 470, 473 (1995).

We conclude that the trial court's decision to award fees was a reasonable and proper exercise of its discretion. The PRB violated a court order specifically mandating that they produce the record within 24 days, by not producing the record for over 100 days. Gillies needed to expend additional attorney's fees as a result of the PRB's violation of the court's order, and, as a result, the court ordered the PRB to pay those fees as a sanction for violating the court's order. The award of Gillies's attorney's fees was reasonable, and, contrary to the PRB's assertions, was clearly legally authorized. Therefore, we affirm the trial court judgment granting Gillies her attorney's fees.

III. CONCLUSION.

In sum, due to the PRB's failure to refute a number of Gillies's claims relating to the order quashing her writ of certiorari, we deem Gillies's claims admitted and reverse the trial court order. We also conclude that the trial court properly exercised its discretion in awarding Gillies her attorney's fees as a sanction for the PRB's violation of the court's order, and therefore, we affirm the judgment awarding Gillies her attorney's fees.

By the Court.—Order reversed; judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

